SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOSEPH R. SLIGHTS, III
JUDGE

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December 20, 2011

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Re: *Kaufman v. Nisky*
C.A. No. N11C-04-204 JRS

Dear Counsel,

As you know, Defendant, Myra Nisky, has moved to dismiss the complaint filed by Plaintiff, Kathleen Kaufman, on grounds of *res judicata* and statute of limitations. For the reasons that follow, the motion is **DENIED.**

This action arises from personal injuries allegedly sustained by Ms. Kaufman in an automobile accident that occurred on August 15, 2008. Ms. Kaufman filed her

initial complaint on August 6, 2010. Because she failed to serve her complaint within the time prescribed by this Court's rules, and failed to demonstrate good cause for the lack of service, the Court dismissed the complaint pursuant to Delaware Superior Court Civil Rule 4(j) by order dated April 6, 2011. Ms. Kaufman then refiled her complaint on April 25, 2011, and timely effected service upon the defendant under Delaware's long arm statute, 10 *Del. C.* § 3114. Defendant filed this motion to dismiss the complaint on November 16, 2011.

Res Judicata

Ms. Nisky argues that the Complaint must be dismissed because this Court has already dismissed a complaint with identical factual allegations and legal claims for failure to effect service. The law recognizes that *res judicata* precludes efforts to litigate the same cause of action more than once.[1] In Delaware, a dismissal with prejudice is considered an adjudication on the merits.[2] When an action has been dismissed on its merits, the *res judicata* doctrine forecloses a losing party from reasserting for a second time the same cause of action against the same party.[3] In her motion, Ms. Nisky argues that the original complaint was dismissed *with* prejudice,

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[1] *Ezzes v. Ackerman*, 234 A.2d 444 (Del. 1967).

[2] *Savage v. Himes*, 2010 WL 2006573, at *3 (Del. Super. May 18, 2010).

[3] *Id.*

as was suggested by the written Order entered by the Court on April 26, 2011. Accordingly, she argues that Ms. Kaufman can not be permitted to bring the same claims against her again. Notwithstanding the mistaken reference in the Court's order, upon further review of the transcript of the hearing on April 6, 2011, and the Judicial Action Form dated April 8, 2011, the Court finds that the original complaint was actually dismissed *without* prejudice. This is consistent with Rule 4(j) which expressly provides that dismissals for failure to effect timely service shall be "without prejudice."[4] *Res judicata* does not prohibit a plaintiff from refiling a second complaint when the first complaint was dismissed without prejudice.[5]

Statute of Limitations

Ms. Kaufman filed her initial complaint on August 6, 2010. It is undisputed that, at that time, the action was initiated within the applicable statute of limitations. On April 6, 2011, the Court granted Ms. Nisky's motion to dismiss Ms. Kaufman's complaint pursuant to Superior Court Civil Rule 4(j). Ms. Kaufman had failed to complete service upon Ms. Nisky within 120 days of filing her complaint and had failed to "show good cause why such service was not made within that period."[6]

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[4] Del. Super. Ct. Civ. R. 4(j).

[5] *Braddock v. Zimmerman*, 906 A.2d 776, 784 (Del. 2006).

[6] Super. Ct. Civ. R. 4(j).

On April 25, 2011, several weeks after the dismissal of the original complaint, Ms. Kaufman filed a second complaint against Ms. Nisky alleging the same cause of action, but alleging that Ms. Nisky resided in Chestertown, Maryland. On September 16, 2011, Ms. Nisky filed this motion to dismiss arguing that the complaint was barred by the two year statute of limitations which expired on August 15, 2010. It is undisputed that the second complaint of April 25, 2011, was not filed within the two year statute of limitations and would, therefore, be time barred absent some statutory savings.

Defendant's motion requires the Court to determine whether 10 *Del. C.* § 8118, Delaware's so-called "Savings Statute," saves the second complaint from being time-barred by the statute of limitations. The Court finds that the Savings Statute does apply to Ms. Kaufman's second complaint and operates to extend the statute of limitations for one year beyond the date of the Court's order dismissing the initial complaint for want of service.

The Savings Statute provides in relevant part, that: "(a) [i]f in any action duly commenced within the time limited therefor in this chapter [two years], . . . the writ is abated, or the action otherwise avoided or defeated . . . for any matter of form; . . . a new action may be commenced, for the same cause of action, at any time within

one year after the abatement or other determination of the original action . . . ."[7] The Savings Statute "mitigate[s] against the harshness of the defense of the statute of limitations raised against a plaintiff who, through no fault of his own, finds his cause technically barred by the lapse of time."[8]

Both parties agree that the (1) the original action was filed within the two year statute of limitations; and (2) the second action was filed within one year of the dismissal of the first action. Under Delaware law, the Savings Statute will apply if those two factors are met and the first action "abated" or failed as a "matter of form."[9] As a general rule, the Court has found that "any informality, irregularity, or defect in the terms, forms or structure of a writ or summons, or in the service or return of process, which is sufficient to render it invalid, is ground for abating the writ."[10] A "matter of form" refers to a "technical flaw in a complaint or writ or a jurisdictional defect resulting in the dismissal of the case."[11] When determining whether an action falls within the parameters of the Savings Statute, Delaware courts also abide by its "liberal construction" and weigh the equities to determine if it is in the best interest

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[7] 10 *Del. C.* § 8118(a).

[8] *Giles v. Rodolico*, 140 A.2d 263, 267 (Del. 1958).

[9] *Id. See also Gaspero v. Douglas*, 1981 WL 10228, at *2 (Del. Super. Nov. 6, 1981).

[10] *Gaspero*, 1981 WL 10228, at *1 n.1.

[11] *Savage*, 2010 WL 2006573, at *2.

of justice to allow the plaintiff to be heard.[12] As part of this process, the courts typically consider the plaintiff's substantive rights and any potential harm to the defendant as a result of the lack of service or notice.[13]

Plaintiff argues that the original action abated and/or was defeated as a matter of form on April 6, 2010, when the Court dismissed the Complaint without prejudice because it had not been served upon the Defendant within 120 days of filing. Under these circumstances, plaintiff argues that the Savings Statute must be applied to extend the statute of limitations. Defendant argues in opposition that this case aligns more closely with several cases in which the Court did not apply the Savings Statute because dismissal was based on the plaintiff's failure to prosecute or some greater neglect than mere "oversight." She argues that the dismissal of the original action was the "result of Kaufman's continuous failure to prosecute the action."[14]

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[12] *Giles*, 140 A.2d at 267-68 (reviewing the equitable nature of § 8117 which demands a liberal construction "to embrace within it those cases which *equitably* ought to be covered by it") (internal citation omitted) (emphasis in original).

[13] *See id.* (finding that the action "abated" based on a technical requirement and that justice required the allowance of a second suit, especially where no harm would result because the defendant's insurance adjustor was put on notice); *Gaspero*, 1981 WL 10228, at *2-3 (weighing the equities in favor of plaintiff's substantive rights where the deceased defendant and his insurer had "actual (albeit defective) notice" of the claim); *Viars v. Surbaugh*, 335 A.2d 285, 289 (Del. Super. 1975) (giving "weight to the fact that a defendant or his insurer had timely notice of plaintiff's litigation or intent to litigate" when applying § 8117); *Leavy v. Saunders*, 319 A.2d 44, 48 (Del. Super. 1974) (weighing the plaintiff's dealings with defendant or his insurer in determining the degree of carelessness of counsel and level of harm to defendant).

[14] Defendant's Memorandum on 10 *Del. C.* § 8118 at 6 (Dec. 13, 2011).

This Court recognizes that the Savings Statute is not meant to be "a refuge for careless and negligent counsel,"[15] and that Delaware courts have not applied the Savings Statute when the action was dismissed based on a failure to prosecute, total neglect of the attorney, or mistaken strategic decisions by counsel.[16] Ms. Kaufman's complaint, however, was ultimately dismissed due to a technical albeit careless mistake under Superior Court Civil Rule 4(j). Under that rule, the Court shall dismiss an action "*without* prejudice" if the complaint is not timely served to a defendant within 120 days after its filing and the plaintiff can provide no good cause as to the reason for the untimeliness.[17] It is generally recognized that dismissals with prejudice "signif[y] that the court intended to dismiss the action 'on the merits,'" while dismissals without prejudice do not.[18] A complaint dismissed without prejudice is not usually decided on its merits and, when based on a technical deficiency, the Savings Statute applies. Indeed, Rule 4(j)'s mandate that dismissals under the rule "shall be

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[15] *Giles*, 140 A.2d at 267.

[16] *Russell v. Olmedo*, 275 A.2d 249, 249-50 (Del. 1971) (purposeful seven month delay in service); *Towles v. Mastin*, 2007 WL 3360034, at *2 (Del. Super. Oct. 18, 2007) (purposeful service in New Jersey after considering service in Delaware); *Savage*, 2010 WL 2006573, at *3 (failure to prosecute).

[17] Super. Ct. Civ. Rule 4(j).

[18] *O'Donnell v. Nixon Uniform Service, Inc.*, 2003 WL 21203291, at *3-4 (Super. Ct. May 20, 2003).

without prejudice" suggests that a decision to dismiss a complaint under Rule 4(j) is not based on the action's merits.

The initial finding under Rule 4(j) that the plaintiff had not demonstrated good cause for the failure to effect timely service does not, *per se,* bar application of the Savings Statute. No Delaware case law speaks directly to applying the Savings Statute to dismissals under Rule 4(j), however, *Giles v. Rodolico* does address a similar situation. In *Giles*, the defendant moved to dismiss the complaint on the basis of Superior Court Rule 4(a) because the plaintiff filed a praecipe 48 days after receiving the original writ with a *non est* return. Plaintiff, in opposition to the motion to dismiss, argued "excusable neglect." The court ruled that there was no showing of excusable neglect and dismissed the action. Nevertheless, in order to avoid forfeiting substantive rights of plaintiff due to procedural technicalities, plaintiff was granted leave to commence a new action under 10 *Del. C.* § 8117.[19]

On appeal, the Supreme Court found that: (1) the Superior Court exceeded its authority in purporting to grant leave to file a new action when it was an absolute right under § 8117 (and the new complaint was not yet before the trial court); and (2) § 8117 would apply to save the second-filed action. The Court noted that the first action abated due to failure to obtain jurisdiction which is a technical defect and not

[19] *Giles*, 140 A.2d at 265.

on the merits of the case; and, "while there [wa]s no legal excuse for the failure to issue an alias writ at the proper time [inexcusable neglect], it appear[ed] that no harm [would] result from the allowance of a second suit."[20]

Giles suggests that even though there was inexcusable neglect that resulted in a technical error in service (similar to this Court's finding of no "good cause" for failure to effect timely service in the instant action), the Savings Statute still applied. This holding is consistent with this court's holdings in *Viars*, *Leavy,* and *Fort v. Kosmerl*, where the court recognized that the savings statute will apply to save a plaintiff who initially files her complaint on time only to have it dismissed for "technical" reasons that arise from "careless oversight or action[s] of counsel."[21] Indeed, Rule 4(j)'s mandate that any dismissal under the rule be without prejudice would be difficult to reconcile with a holding that dismissals under Rule 4(j) can never trigger the protections of the Savings Statute. Rule 4(j) dismissals are predicated by necessity and in every instance upon a finding that plaintiff has not demonstrated "good cause" for the failure to effect timely service. And yet the rule

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[20] *Id.* at 267.

[21] *See Fort v. Kosmerl*, 2004 WL 594939, at * 9 (Del. Super. Mar. 11, 2004). *See also Viars*, 335 A.2d at 289; *Leavy*, 319 A.2d at 48.

requires that the court enter the dismissal without prejudice, apparently in recognition of the fact that the dismissal is "upon a matter of form,"[22] not substance.

The Court is also satisfied that a weighing of the equities justifies application of the Savings Statute in this instance. In this regard, the Court finds that applying the Savings Statute will cause no discernable prejudice to the Defendant.[23] When weighed with the Plaintiff's opportunity to have her substantive rights heard on the merits, the Court finds that her counsel's failed attempt at service should not bar her renewed action.

Conclusion

The doctrine of *res judicata* does not preclude the Plaintiff from re-filing a complaint that was dismissed without prejudice. And, based on the statutory language of 10 *Del. C.* § 8118, Delaware precedent, and the interests of justice, the

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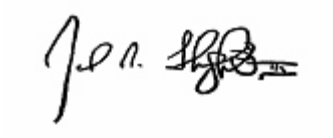
[22] *See Giles*, 140 A.2d at 267.

[23] The Court notes that Ms. Nisky's insurance carrier, State Farm, was informed of the representation of Ms. Kaufman and the claim against the insured as early as December 11, 2008. While this factor is not dispositive of the "prejudice" issue, the Court does consider this notice, in addition to the defendant's failure to identify specifically any other "prejudice" that would result from the Court's decision to allow the plaintiff to prosecute her second complaint on the merits, as weighing in favor of applying the Savings Statute in this instance. *See, e.g.*, *Giles*, 140 A.2d at 267-68 (allowing a second suit especially where no harm would result because the defendant's insurance adjustor was put on notice); *Gaspero*, 1981 WL 10228, at *2-3 (weighing the equities in favor of plaintiff's substantive rights where the deceased defendant and his insurer had "actual (albeit defective) notice" of the claim); *Viars*, 335 A. 2d at 289 (giving "weight to the fact that a defendant *or* his insurer had timely notice of plaintiff's litigation or intent to litigate" when applying § 8117) (emphasis supplied); *Leavy*, 319 A.2d at 48 (weighing the plaintiff's dealings with defendant or his insurer in determining the degree of carelessness of counsel and level of harm to defendant).

Court finds that the Savings Statute applies to the Plaintiff's second-filed complaint and that it is not, therefore, time barred. The motion to dismiss is **DENIED.**

IT IS SO ORDERED.

Very truly yours,



Joseph R. Slights, III